STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE TITLE OFFICE, INC.,

Plaintiff
Appellee,

Supreme Court
File No. 121077, 121078

v

COA#: 225376

VAN BUREN COUNTY TREASURER,

Livingston CC: 99-017173-CZ

Defendant
Appellant,

and

ALLEGAN COUNTY TREASURER, BRANCH COUNTY TREASURER, HILLSDALE COUNTY TREASURER, IONIA COUNTY TREASURER, JACKSON COUNTY TREASURER, KALAMAZOO COUNTY TREASURER, AND LIVINGSTON COUNTY TREASURER,

Defendants.

APPELLANT'S BRIEF
(Oral Argument Requested)

Thomas G. King (P34006)
Stacy Soper-Stine (P60765)
Attorney for Defendant Karen Makay, Van Buren County Treasurer:
KREIS, ENDERLE, CALLANDER & HUDGINS, P.C.
One Moorsbridge, P.O. Box 4010
Kalamazoo, MI 49003-4010
(616) 324-3000

Kreis Enderle Callander & Hudgins
Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE TITLE OFFICE, INC.,

Plaintiff
Appellee,

Supreme Court
File No. 121077, 121078

v

COA#: 225376

VAN BUREN COUNTY TREASURER,

Livingston CC: 99-017173-CZ

Defendant
Appellant,

and

ALLEGAN COUNTY TREASURER, BRANCH COUNTY TREASURER, HILLSDALE COUNTY TREASURER, IONIA COUNTY TREASURER, JACKSON COUNTY TREASURER, KALAMAZOO COUNTY TREASURER, AND LIVINGSTON COUNTY TREASURER,

Defendants.

APPELLANT'S BRIEF
(Oral Argument Requested)

Thomas G. King (P34006)
Stacy Soper-Stine (P60765)
Attorney for Defendant Karen Makay, Van Buren County Treasurer:
KREIS, ENDERLE, CALLANDER & HUDGINS, P.C.
One Moorsbridge, P.O. Box 4010
Kalamazoo, MI 49003-4010
(616) 324-3000

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

TABLE OF CONTENTS

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

TABLE OF AUTHORITIES

Michigan Supreme Court **Page**

Michigan Court of Appeals

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

Michigan Statutes

Michigan Court Rules

Other

Kreis
Enderle
Callander
&Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

STATEMENT OF BASIS OF JURISDICTION

The Court of Appeals issued an Opinion in this matter on January 18, 2002, wherein it reluctantly, pursuant to MCR 7.215(I)(1), upheld the Trial Court's Order granting summary disposition under MCR 2.116(C)(10) to the Plaintiff-Appellee. As part of its Opinion, the Court requested that a special panel be convened to resolve the conflict that existed between part of its own findings in the present action and that of Oakland County Treasurer v The Title Office, 245 Mich App 196, 627 NW 2d 317 (2001). In an order dated February 8, 2002, a majority of the Judges polled determined that a special panel would not be convened. Pursuant to MCR 7.302(C)(2)(b), this Court considered Appellant's Application for Leave to Appeal. In an Order entered on April 2, 2003, this Court GRANTED the Application for Leave to Appeal.

Kreis
Enderle
Callander
&Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

STATEMENT OF QUESTIONS INVOLVED

QUESTION I: DID THE LEGISLATURE INTEND FOR THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT (MCL §48.101(1); MSA §5.711(1)) TO COVER SUBSEQUENTLY DEVELOPED MEANS OF DOCUMENT REPRODUCTION?

Appellant says: YES

Appellee says: NO

Trial Court said: NO

Court of Appeals: NO (but with disagreement)

QUESTION II: DOES THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT (MCL §48.101(1); MSA §5.711(1)) SPECIFICALLY AUTHORIZE THE SALE OF PUBLIC RECORDS OR SPECIFICALLY DESIGNATE THE AMOUNT OF A FEE FOR PROVIDING A COPY OF THE PUBLIC RECORD AND, AS A RESULT, THE FEE TO BE PAID FOR THE REQUESTED INFORMATION COMES WITHIN THE SPECIAL FEE PROVISIONS OF SUBSECTION 4 OF THE MICHIGAN FREEDOM OF INFORMATION ACT (MCL §15.234; MSA §4.1801(4))?

Appellant says: YES

Appellee says: NO

Trial Court: NO

Court of Appeals: NO

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

APPELLANT'S BRIEF

A. Introduction

The facts and circumstances surrounding this appeal are undisputed. The disputed questions are questions of law, in particular, statutory interpretation. The fundamental question for the Court is whether the fee for the records requested by Appellee, that being an electronic copy of the property tax records and the delinquent tax records, falls under the Transcripts and Abstracts of Records Act (TARA), MCL §48.101(1): MSA §5.711(1) or the general fee provisions of the Freedom of Information Act (FOIA), MCL §15.234: MSA §4.1801(4).

B. Statement of Facts

i. FACTUAL BACKGROUND

On February 27, 1997, Karen Makay, the Treasurer for Van Buren County ("hereinafter "Van Buren County") received a letter from Plaintiff-Appellee requesting certain tax transcript information pursuant to the Michigan Freedom of Information Act[1]. (**Exhibit 1**). On March 4,1998, Appellant responded, explaining its policy regarding such requests for information (**Exhibit 2**). Plaintiff-Appellant sent a follow up letter on August 14, 1998. (**Exhibit 3**). Similar initial and follow up letters were also, upon information and belief, sent to at least six (6) other County Treasurers by Plaintiff-Appellee. Plaintiff-Appellee, in the initial request, asked for "an electronic copy of the property tax records and the

[1]The Michigan Freedom of Information Act, found at MCL 15.231; MSA 4.1801(1), et. seq. will be referred to hereinafter as the "FOIA".

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

delinquent tax records of Van Buren County for the years 1996 and 1997". (**Exhibit 1**). In the follow up letter, the request was for "an electronic copy of the tapes or files that contained the 1995, 1996 and 1997 property tax records of Van Buren County". (**Exhibit 3**). Plaintiff-Appellee requested all of the tax information maintained by the Van Buren County Treasurer's office as that information existed on the day the information was to be provided to Plaintiff-Appellee. The information requested, if not requested in "an electronic copy", would be provided on a parcel by parcel basis via written tax abstract. The written tax abstracts are directly printed from the information maintained in the Van Buren County computer files and are not hand prepared.

In response to both requests, the Van Buren County informed the Plaintiff-Appellee that the information requested would be released; however, the Transcripts and Abstracts of Records Act, being MCL §48.101; MSA 5.711, and by incorporation, the Freedom of Information Act, being MCL 15.234(4); MSA 4.1801(4)(4), required Plaintiff-Appellee to pay the statutory fees set forth in the Transcripts and Abstracts of Records Act (see **Exhibits 2** and **4**).

Plaintiff-Appellee refused to pay the statutory fee as set forth in the Transcripts and Abstracts of Records Act. Plaintiff-Appellee has offered to pay the general FOIA fees, being the actual incremental labor costs of duplicating (in this case downloading) the data and to provide a three and one-half (3 ½") inch personal computer disc upon which a copy of the abstract information can be downloaded.

Van Buren County's response informed Plaintiff that the information requested (although requested in an electronic copy format), constituted a

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

request under the Transcripts and Abstracts of Records Act and as a result, the legislature had mandated the County Treasurer collect a fee of $.25 per abstract to be provided and requested a deposit as permitted under the FOIA. Van Buren County is and has been willing to produce the tax abstract data on a computer disc (in a mutually acceptable format if possible) so long as Plaintiff-Appellee pays the fee required by the Transcripts and Abstracts of Records Act and incorporated as the fee under the FOIA pursuant to the provisions of MCL 15.234(4); MSA 4.1801(4)(4) (**Exhibits 2 and 4**).

Plaintiff-Appellee has submitted similar requests to a majority of the counties in Michigan and has brought or been a defendant in suits in several counties regarding these requests. The results of the cases in which decisions have been rendered have created inconsistent decisions with varying opinions.

ii. PROCEDURAL HISTORY

On or about October 18, 1998, Plaintiff-Appellee filed suit in the Circuit Court seeking an order in *mandamus* directing each Defendant County Treasurer to provide it with the requested records in electronic format and sought an order requiring each Defendant County Treasurer to charge only the actual incremental cost of downloading the information onto computer tape (See Plaintiff-Appellee's Complaint at Paragraph Nos. 16 and 26, **Exhibit 5**).

On March 15, 1999, Plaintiff-Appellee filed a Motion for Summary Disposition under MCR 2.116(C)(10). After oral arguments were heard, the Trial Court issued a written Opinion dated December 29, 1999 (**Exhibit 6**). The Trial Court Opinion dated December 29, 1999 held that the general fee provisions of the FOIA applied to Plaintiff-Appellant's request rather than the fee provisions of

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

the TARA. The Trial Court based its holding on its opinion that the TARA did not authorize the sale of public records nor specifically designate the amount of the fee for providing copies of said records.

On February 22, 2000, Defendant-Appellant filed an appeal of right with the Court of Appeals, appealing the Trial Court's Opinion granting summary disposition in favor of Plaintiff-Appellant. The Court of Appeals was presented with the following two issues:

(1) whether the Trial court erred when it determined that the TARA did not specifically authorize the sale of public records and thus was not subject to the fees permitted under the FOIA exception at MCL §15.234(4):MSA §4.1801(4)(4); and

(2) whether the Trial Court erred when it determined that the TARA did not specifically designate the amount of a fee for providing a copy of the public record in the requested format and thus was not also subject to the fee permitted under the FOIA general fee exception found in MCL §15.234(4): MSA §4.1801(4)(4).

In a decision entered on January 18, 2002, the Court of Appeals determined that the records request issued by Plaintiff-Appellee did constitute a request for records under TARA and, therefore, was not subject to the general fee provisions of the FOIA but rather to the specific fees as set forth in TARA (**Exhibit 7**). However, the Court of Appeals affirmed the decision of the Trial Court granting Plaintiff-Appellee summary disposition because it was constrained by MCR 7.215(I)(1) to follow the decision in Oakland County Treasurer v The Title Office, Inc., 245 Mich App 196; 627 NW 2d 317 (2001), even though that was a decision with which the current panel of the Court of Appeals disagreed. The Title Office v Van Buren County Treasurer, 249 Mich App 322, 324; 643 NW 2d 244 (2002). The three judges of the Court of Appeals who heard this case

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

requested that the Chief Judge of the Court convene a special panel to address the issue, which request was denied. Id. The request was denied. 249 Mich. App. 805; 643 N.W.2d 244 (2002) (**Exhibit 8**).

The Court of Appeals, in its decision, stated as follows:

> We conclude that the TARA does not specifically authorize the sale of public records to the public, but does specifically provide the amount of the fee for providing a copy of the public record to the public. Accordingly, we would hold that the FOIA's cost provisions do not apply to the plaintiff's request for electronic copies of property tax records. 249 Mich App 328-329.
>
> * * *
>
> . . . the trial court's ruling hinged upon its definition of the statutory term "transcript." The TARA provides that a county treasurer shall, upon request, make "a transcript of any paper or record on file in the treasurer's office," in accordance with the specified fees. MCL 48.101. Plaintiff argued, and the trial court agreed, that an electronic copy of the property tax records did not qualify as a "transcript" of those records. We conclude that the trial court erred as a matter of law in reaching that conclusion. 249 Mich App 334.

After the Order of February 8, 2002 denying the request to convene a special panel, Appellant filed with this Court its Application for Leave to Appeal which was granted in an order dated April 2, 2003 (attached as **Exhibit 9**). This Court has specifically requested that the parties address the Legislature's meaning and intended interpretation of the word "transcript" in the TARA. Id.

C. Standard of Review

The trial court order appealed from is an order granting Plaintiff-Appellee summary disposition. A reviewing court considers a trial court's grant of summary disposition under the *de novo* standard of review. Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW 2d 201 (1998).

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

Under the FOIA, the application of the exemptions requiring a legal determination are reviewed *de novo*. Federated Publications, Inc. v City of Lansing, 467 Mich 98, 101; 649 NW 2d 383 (2002). In the present action, the application of fee structure under TARA, as opposed to the general fees provided for by the FOIA is a question of statutory interpretation, and therefore is reviewed *de novo*. Cruz v State Farm Mutual Auto Ins. Co., 466 Mich 588, 604; 648 NW 2d 591 (2002); see also Koontz v Ameritech Services, 466 Mich 304, 309; 645 NW 2d 34 (2002), additional internal citations omitted.

D. Legal Argument

The trial court's decision to grant Plaintiff-Appellee summary disposition constitutes error for two reasons: First, the TARA and its fee structure clearly was intended by the Legislature to apply to all methods of document or record reproduction that may be developed after the passage of that statute; Second, the TARA authorizes the sale of transcripts and abstracts and therefore, is expressly excepted from the provisions of the FOIA; and Finally, the TARA expressly sets forth specific fees for the sale of such information and for this reason is specifically exempted from the general fee provisions of the FOIA pursuant to MCL §15.234(4); MSA §4.1801(4)(4).

QUESTION I: DID THE LEGISLATURE INTEND FOR THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT (MCL §48.101(1); MSA §5.711(1)) TO COVER SUBSEQUENTLY DEVELOPED MEANS OF DOCUMENT REPRODUCTION?

The fundamental question in the present appeal is whether the fee provisions of the TARA apply to Plaintiff-Appellee's request for electronic copies of the tax records referenced in the TARA or whether said request falls under the

Kreis Enderle Callander & Hudgins
Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

general fee provisions of the FOIA. Section 4 of the FOIA sets forth the fees a municipality or public body may charge a party requesting public records. Subsection 4 of Section 4 of the FOIA excludes certain records requests from the fee provisions of the FOIA providing as follows:

> This section does not apply to public records *prepared under* an act or statute specifically *authorizing the sale of those public records* to the public, or *if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.* MCL §15.234(4); MSA 4.1801(4), *emphasis added.*

Consequently, Appellant asserts that because the TARA provides for the sale of the public tax records requested by Plaintiff-Appellee and because the TARA sets the amount of the fee for providing copies of these records, the FOIA general fee provisions are inapplicable.

The principal goal of judicial statutory interpretation is to discern and give effect to the intent of the Legislature. People v Morey, 461 Mich 325, 329-330; 603 NW 2d 250 (1999); Frankenmuth Mutual Ins. Co. v Marlette Homes, Inc., 456 Mich 511, 515; 573 NW 2d 611 (1998). These rules governing statutory construction are intended to serve as guides in determining legislative intent with a greater degree of certainty. In re Quintero Estate, 224 Mich App 682, 692-693; 569 NW 2d 889 (1997). The judiciary's obligation, when examining statutory language, is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. Herald Co. v City of Bay City, 463 Mich 111, 117-118; 614 NW 2d 873 (2000)(citations omitted).

The language of the TARA, and its subsequent implementation demonstrates that the Legislature clearly intended that the statute would be

utilized regardless of the future methods of document or record reproduction that may be developed. The provisions of the TARA read in relevant part as follows:

> Sec. 1 (1) A county treasurer shall make upon request *a transcript of any paper or record on file* in the treasurer's office for the following fees:
>
> (a) For an abstract of taxes on any description of land, 25 cents for each year covered by the abstract.
> (b) For an abstract with statement of name and residence of taxpayers, 25 cents per year for each description of land covered by the abstract.
> (c) For list of state tax lands or state bids, 25 cents for each description of land on the list.
> (d) For 1 copy of any paper or document at the rate of 25 cents per 100 words.
> (e) For each certificate, 25 cents.
>
> MCL §48.101(1); MSA 5.711(1), *emphasis added.*

This Court has requested that the parties specifically address whether the Legislature, when originally enacting the TARA in 1897, intended the act to cover subsequently developed means of document reproduction. There can be no question that the Legislature did in fact intend that this statute would apply to all subsequently developed means of document reproduction.

First, the language of the statute itself addresses *a transcript of any paper or record on file*. The word transcript is used to reference a copy or duplication of the record, regardless of the form it takes. If the statute only presumes one method of information storage and document reproduction, that being the creation of a duplicate hard copy, "any paper on file" would be sufficient. The statutes says "any paper or record on file". The express statutory language confirms that the Legislature intended the statute to refer to papers as well as other forms of records.

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

Certainly when the statute was originally enacted in 1895, the county treasurers did not possess photocopy machines that automatically copied the requested transcript or abstract (photocopy machines did not become available for use until the early 1950s, Encyclopedia Britannica, 2003). Rather, the County was likely required to have an employee manually recreate the official document. This was the original method of document reproduction. Thereafter, as a result of technological developments, counties gained the capability of recreating the transcript or abstract not manually, but by photocopying the document. Nevertheless, at no time have the Courts ruled that the TARA does not apply to the photocopying method of document reproduction simply because the original method of reproduction was manual transcription. Now Technology has again changed and records are stored electronically and transcripts of those records are produced by either printing, emailing, downloading or other forms of electronic transfer.

The use of the word transcript, when given its clear meaning, means any form of the information that is an exact copy of the county's information, whether it be copied by a person actually retyping the entire document, taking a picture of the information and producing its picture (photocopy), or transmitting a copy in electronic form. To limit the definition of transcript as it was specifically applied when the statute was drafted would require the county to forever produce only manually re-typed duplications of the requested information. This is an absurd construction that is clearly inconsistent with the Legislature's intent and common sense.

Kreis
Enderle
Callander
&Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

The Court of Appeals recognized this absurdity when it stated as follows:

> Plaintiff argues that the TARA governs only "*written documents*" and "paper copies." However, the TARA does not contain the term "written," and it does not state that a county treasurer shall make, upon request, a "paper copy" of its records. Rather, the statute applies broadly, requiring a county treasurer to make, upon request, "a transcript of any paper or record on file in the treasurer's office." MCL 48.101(1). An electronic copy of property tax records qualifies as a "transcript" of that record, for purposes of the TARA. The medium on which the record is copied is of no significance. A copy is a copy, whether the information is handwritten-typed, photocopied, or electronically copied; it remains a copy, whether the information is placed onto paper, magnetic tape, or a computer disk.
>
> Plaintiff also argues that the Legislature could not have intended the TARA to apply to electronic copies of county records because the Legislature enacted the statute in 1895, before the invention of computers. However, if we accept plaintiff's logic, then we would also be compelled to hold that the schedule of fees contained in the TARA does not properly apply to typewritten copies or photocopies of county records, because the 1895 Legislature could not have envisioned the invention of typewriters or photocopy machines. The Legislature chose to frame the statute in broad terms, applying to "any paper or record" on file in the treasurer's office. MCL 48.101. This language is certainly broad enough to include records that are not maintained on paper. 249 Mich App 335.

The Court of Appeals' interpretation is correct. The broad statutory language includes any "paper or record". If the Legislature only intended the statute to apply to hard copies or papers, the word "record" would not have been included. The statute does not limit the record production to paper copies.

QUESTION II: DOES THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT (MCL §48.101(1); MSA §5.711(1)) SPECIFICALLY AUTHORIZE THE SALE OF PUBLIC RECORDS OR SPECIFICALLY DESIGNATE THE AMOUNT OF A FEE FOR PROVIDING A COPY OF THE PUBLIC RECORD AND, AS A RESULT, THE FEE TO BE PAID FOR THE REQUESTED INFORMATION COMES WITHIN THE SPECIAL FEE PROVISIONS OF SUBSECTION 4 OF THE MICHIGAN FREEDOM OF INFORMATION ACT (MCL §15.234; MSA §4.1801(4))?

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

i. The Freedom of Information Act's Provisions Regarding Fees.

The general FOIA fee provisions are found in subsections (1) and (3) of MCL 15.234; MSA 4.1801(4) and provide as follows:

> Sec. 4(1). A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of the record. Subject to subsections (3) and (4), the fee shall be limited to the actual mailing costs, and the actual incremental costs of duplication of publication including labor, the cost of search, examination, review and the deletion and separation of exempt from non-exempt information as provided in Section 14. A search for a public record may be conducted or copies of the public record may be furnished without charge or a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because search for or furnishing copies of a public record can be considered as primarily benefiting the general public. A public record search shall be made and a copy of public records shall be furnished without charge for the first $20 of the fee for each request to an individual who is entitled to information under this act and who submits an affidavit stating the individual is then receiving public assistance or if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.
>
> * * *
>
> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation and deletion under subsection (1), a public body may not charge more than the hourly wage than the lowest paid public body employee capable of retrieving the information necessary to comply with the request under this Act. Fees shall be uniform and shall not be dependent upon the identity of the requesting person. A public body shall utilize the most economic means available for making copies of public records. A fee shall not be charged for the cost of the search, examination, review, and the deletion and separation of exempt from non-exempt information as provided in Section 14 unless failure to charge a fee would result in unreasonably high cost to the public body because of the nature of the request in the particular interest and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

According to subsection (1) above, a public body is clearly permitted to charge a fee for providing a copy of public records but the amount of the fee is limited.

An exception to this general fee rule under the FOIA exists at subsection (4) and applies in instances where a different statute provides that a fee be paid for the sale of a public record *or* for providing a copy thereof. MCL 15.234(4); MSA 4.1801(4)(4). The exception states as follows:

> (4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute. Id.

Thus, once a request is made to a public body for a copy of a public record under the FOIA, the public body to whom the request was made must determine whether the general fee provisions of the FOIA apply or if another statute which specifically authorizes the sale of public records and/or provides a fee for providing such a copy of that public record exists and provides for a different fee. The general fee provisions of the FOIA are only employed to determine the appropriate fee to be charged if no other statute providing for a fee exists.

ii. The Transcript and Abstract of Records Act.

Under the TARA, MCL 48.101; MSA 5.711, as previously described, a county treasurer is specifically required by statute to charge a fee for a transcript of any paper *or* record on file with the treasurer's office. MCL 48.101; MSA 5.711 provides, in relevant part, as follows:

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

> Sec 1(1). A county treasurer shall make upon request a transcript of any paper or record on file in the treasurer's office for the following fees:
>
> (a) For an abstract of taxes on any description of land, 25 cents for each year covered by the abstract.
>
> (b) For an abstract with statement of name and residence of taxpayers 25 cents per year for each description of land covered by the abstract.
>
> (c) For a list of state tax lands or state tax bids, 25 cents for each description of land on the list.
>
> (d) For 1 copy of any paper or document at the rate of 25 cents per 100 words.
>
> (e) For each certificate, 25 cents.

Given the fact that the TARA specifically states that a fee shall be charged to the public for a transcript of any paper or record on file with the treasurer's office, it is clear that the statutes provide a fee to be charged to the public for these items.

iii. Whether the TARA provides for the sale of a public record

The sole issue before the Trial Court on Plaintiff-Appellee's Motion for Summary Disposition under MCR 2.116(C)(10) was whether the FOIA or the TARA applied to the Plaintiff-Appellee's request for a computer tape containing each county's property tax records (**Exhibit 6**). The Trial Court focused its analysis on the language of the TARA and divided its discussion into two parts; First, whether the TARA specifically authorized the sale of public records and second, whether the TARA specifically designated a fee amount for providing a copy of a public record. Id.

As to the first issue, whether the TARA authorized the sale of public records, the Trial Court held that it did not citing and relying upon the case of Grebner v Clinton Charter Township, 216 Mich App 736; 550 NW2d 265 (1996). The issue before the Grebner court was whether the Michigan Election Law ("MEL"), being MCL 168.522(1); MSA 6.1522(1), specifically authorized the sale of voter registration rolls and thus fell within the FOIA fee exception at subsection (4). (**Exhibit 6**). The Grebner court found that while the MEL did provide for the cost of the preparation of copies of voter registration records, the statute did not "explicitly" authorize the sale of voter registration rolls. Id. The Trial Court determined that the case at bar was analogous to the Grebner decision and held that while the TARA authorized the payment of costs for copy preparation, the statute did not authorize the sale of such documents. Id. Based upon this reasoning, the Trial Court determined that the general fee provisions of the FOIA applied and not the TARA, resulting in its grant of Plaintiff-Appellee's request for summary disposition. Id.

The Court of Appeals agreed with the Trial Court respecting the question whether the TARA provided for the sale of a public record. In its analysis, the Court found that while the Legislature had clearly intended that two separate exceptions apply to the general fee rules of the FOIA, the sale of records exception was not applicable under the TARA. (**Exhibit 7** at p. 6). As with the Trial Court, the Court of Appeals relied upon the case of Grebner, supra. Both courts relied upon Grebner's analysis that for a statute to "specifically" authorize the sale of a public record, the statute must do so "explicitly." Id. at 7; Grebner, at 743.

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

iv. Both of the Lower Courts erred when they held that the TARA did not permit the sale of records.

The Trial Court and the Court of Appeals both erred when they found that the TARA did not authorize the sale of transcripts and abstracts of tax records. In addition, the reliance of both courts on the ruling in Grebner, supra, was inappropriate as that case is distinguishable from the case at bar. Further, both courts' analysis failed to consider the viable circumstance in which a statue can provide both for the sale of a public record and a specific fee required to pay for said public record.

It is apparent from the findings of both courts that they have misinterpreted Grebner and gone well beyond its ruling. In Grebner, the statute neither set a specific fee nor indicated that the document (a voter registration roll) was being sold. Further, the Court of Appeals incorrectly determinated that the two provisions of the FOIA exception to its fee provisions; (1) the statute providing for the sale of a public record, and (2) the statute providing a specific fee for obtaining a copy of a public record must be two wholly separate, mutually exclusive provisions in order to give both meaning. There is no logical reason that a statute cannot be both provide for the sale of a public record and provide a specific fee for obtaining a copy of the record.

The Court of Appeals decision intimates that a sale is something other than the transfer of the public record for the actual cost to the public body reproducing it while a fee typically involves the provision of the copy for an established amount of money. If we presume that a sale requires that the seller obtain a "price" for the public record that is based upon market value or at least

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

involves a profit of some sort, rather than the actual cost to the seller of the product, then the "sale" of the public record means the same as the purchase of the public record at the set "fee" only where the "fee" is other or greater than the actual cost to the public body for reproducing the public record.

Consequently, the two separate provisions of the FOIA fee exception; (1) a statute providing for the sale of a public record, and (2) a statute that sets a specific fee for a public record may be but are not necessarily, nor do they have to be mutually exclusive. A statute can meet both of these exceptions and still be consistent with the statute so long as it cannot be said that every statute that authorizes a specific fee would also authorize the "sale" of the public record. A statute that set a specific fee that is equal to or lower than the cost to the municipality of actually reproducing or transcribing the public record would not constitute a sale. However, a statute that set the specific fee at above the actual cost to reproduce or transcribe the record would meet both of these tests. Such is the case in the present circumstance. The Legislature's inclusion of specific fee provision in the FOIA, in addition to the sale of the public records was to assure that a statute that provided for a specific fee which did not result in a profit or earning to the public body would still be excepted from the specific fee provisions of the FOIA.

At the time the FOIA was enacted, the Legislature had already implemented specific legislation governing the duties of county treasurers and established specific fees for treasurer's office information in the TARA. When the FOIA was enacted, the Legislature did not repeal the TARA and has not acted to repeal this legislation since passage of the FOIA despite ample opportunity to do

Kreis
Enderle
Callander
&Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

so. Furthermore, County Treasurers are entrusted with the duty to "receive all moneys belonging to the county, from whatever source they may be derived..." MCL 48.40; MSA 5.686. County Treasurers, as custodians of the records, are required to charge the fees which the Legislature has told the County Treasurer that he or she must charge.

As a result, it is clear that the both lower courts erred when they determined that the TARA did not specifically authorize the sale of public records and is thus not subject to the general fee exception provision of the FOIA. MCL 15.234(4); MSA 4.1801(4)(4).

v. The Tara Contains a Specific Fee for Obtaining the Public Records Requested by Plaintiff-Appellee

The MEL cited in the Grebner case simply had a reference to payment to the clerk of the cost of making, certifying or delivering the tape, disk or listing without specifically providing for either the "sale" of the record or a specific fee for providing a copy of the record to the public. Id. at 742. The TARA, on the other hand, has specific fees set for the information that is being requested. It is clear from the plain meaning of the language in TARA that the statute establishes a fee for providing a copy of Treasurer's Office records to the public.

In fact, Section 1 of The TARA specifically uses the word "fees" and the term "fee" is specifically referenced in the preamble providing a "fee for providing a copy of the public record" as required by the exception provision of the FOIA. MCL 15.234(4); MSA 4.1801(4)(4). To read the TARA to do anything other than specifically designate the amount of the fee for providing a copy of the public

Kreis Enderle Callander & Hudgins
Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

records listed in the TARA ignores the plain language of the TARA and the plain language of the FOIA.

Furthermore, it is well settled that when two statutes appear to be in conflict, the more specific will prevail, especially if it was enacted subsequently to the more general one. First Bank of Cadillac v Miller, 131 Mich App 764; 347 NW2d 715 (1984); Hengartner v Chet Swanson Sales, Inc., 132 Mich App 751; 348 NW2d 15 (1984). When the FOIA was enacted in 1977, the Legislature, recognizing the vast difference in types and quantities of information which would be released pursuant to the FOIA, saw fit to provide both general and specific fees for reproducing information pursuant to a FOIA request. The Legislature recognized that there are situations in which a specific statutory fee has been established for the information requested and that the FOIA should not be used to attempt to avoid the statutory fee. The clear statutory language of the TARA provides for a specific fee for obtaining the records sought by Plaintiff-Appellee. That fee applies regardless of the format in which the record is provided. To interpret the statute otherwise would be, as determined by the Court of Appeals, incorrect as a matter of law. 249 Mich App 334. To find that the production request made by the Plaintiff-Appellee does not fall under the TARA merely because the Plaintiff-Appellee requested the information be produced in electronic form is a strained reading and distortion of the statute, particularly as it was clearly intended to be interpreted by the Legislature.

vi. The purpose of the FOIA is not to enable a private commercial concern to reap substantial financial benefits at the expense of local units of government and their citizens but to provide a means for people to be informed so that "they may fully participate" in the democratic process.

MCL 15.231(2); MSA 4.1801(1)(2) provides:

> [I]t is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully *participate in the democratic process.* (Emphasis added).

Each provision of the FOIA must read so as to be consistent with this purpose. In Kesterbaum v Michigan State University, 414 Mich 510, 533; 427 NW2d 783, 785 (1982), this Court (reviewing the balancing test which must be applied to determine whether the release of information constituted an unwarranted invasion of privacy) held that a request for names and addresses of students should not be disclosed as being information of a personal nature. This Court found that the reason the information is sought is not a controlling factor in determining whether information should be released, but that the use of the information can be considered when defining the public interests, Id. at 527. If the information requested is consistent with the legislative intent, and the public interest would be sufficiently served, disclosure may be warranted, Id. at 527.

In the case at bar, it cannot be said that the request for information is consistent with the public purpose expressed by the Legislature. While release of the information is not the issue, the commercial purpose for the request is

another reason for not allowing the Plaintiff-Appellee to avoid the statutory fee by the format in which it chooses to receive the information.

Plaintiff-Appellee has requested the information contained in the property tax records of Van Buren County for purposes of establishing a "Web site" on the Internet to enable those who wish to look up the tax rolls via a home computer to be able to do so. (Plaintiff-Appellee's Brief in the Trial Court, pp.3, 4). Plaintiff-Appellee asserted that it "**currently** does not charge any kind of fee for access to this information" (Plaintiff-Appellee's Brief in the Trial Court, p.4). However Plaintiff-Appellee's counsel, during the hearing on the Motion for Change of Venue, acknowledged that Plaintiff-Appellee anticipated that it might charge a fee to the public for the information in the future.

The issue here is not whether the information should be released, but whether Plaintiff-Appellee may avoid the statutory fee by requesting the records on computer disk. The Van Buren County Treasurer submits that when Plaintiff-Appellee's request is examined in light of the legislative purpose of the FOIA, Plaintiff-Appellee's purpose is clearly commercial. The FOIA provides "The people shall be informed so that they may fully ***participate in the democratic process.***" (Emphasis added). Plaintiff-Appellee's acknowledgment that the public may be charged for the information, falls far short of the goal of allowing everyone to fully participate in the democratic process. (Plaintiff-Appellee's Brief in the Trial Court, pp. 3, 4). In reality, the request for records is Plaintiff-Appellee's attempt to deprive the governmental units and their citizens of the statutory fee in order to increase the profit that Plaintiff-Appellee makes when

Kreis
Enderle
Callander
&Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

selling the information to customers as part of Plaintiff-Appellee's for-profit business.

In an effort to enhance its financial gain, Plaintiff-Appellee refused to pay the lawfully mandated fee by claiming that it is not requesting a tax abstract, but requesting the tax abstract information in "electronic format". Plaintiff-Appellee asserted that "[t]he Title Office would have to pay thousands of dollars to each county for copies of the requested public records". (Plaintiff-Appellee's Brief in the Trail Court, p.3). At the same time, Plaintiff-Appellee suggested that the Trial Court employ form over substance and hold that tax transcript information on computer disk is not an abstract of taxes so it may deprive each county in the state, and their citizens, of thousands of dollars of statutory fees (fees which are established by statute and help defray the costs of maintaining the information requested) and then charge the business community and the public at large fees (which in all likelihood would exceed the twenty-five cents (25¢) per abstract statutory fee) for the same information so that it can make a greater profit. Once the information is "on line" the Realtors, lenders and other professionals will be paying fees set by the Plaintiff-Appellee, and the Counties will be denied fees established by statute and used to partially defray the cost of maintaining the Treasurer's Office the information being sold by Plaintiff-Appellee.

The purpose of the FOIA is to provide the information so that the "people" (which include corporations pursuant to MCL 15.232(2)(a); MSA 4.1801(2)) may more fully participate in the democratic process. It is difficult to imagine, how profiting from public information by depriving Treasurer's offices of a minimal statutory fee meets the intent of the FOIA.

Kreis
Enderle
Callander
&Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010

Plaintiff-Appellee's statutory analysis throughout this case has been tortured and dependant upon its claim that tax abstract information provided on computer disk does not constitute a transcript of a tax abstract. Plaintiff-Appellee made this argument because, if it paid the required statutory fee, it would not reap the large profits it hoped for by charging all those who wish to gain access to the information in a "convenient forum". Simply put, Plaintiff-Appellee sought to deprive Van Buren County and its citizens of the statutory fee to enhance its profits. If convenience was the issue, Plaintiff-Appellee's customers should be willing to pay the extra twenty-five cents per parcel mandated by the TARA.

E. CONCLUSION AND REQUEST FOR RELIEF

The Trial Court erred by granting Plaintiff-Appellee's motion for summary disposition because the TARA expressly provides for the purchase of tax property records for a statutory fee, regardless of the manner or form of the reproduction of those records. Therefore, the general FOIA fee provision does not govern the Appellant's reproduction and provision of the property tax records to Plaintiff-Appellee because a specific statutory provision in TARA expressly provides the fee the county must charge for said records.

For these reasons, Appellant respectfully requests that this Court reverse the decision of the Court of Appeals and hold as follows:

(a) that the term "transcript" as stated in the TARA includes electronic reproduction of property tax records; and

(b) that the fee provisions of the TARA apply to the request made by Plaintiff-Appellee for the reproduction of the property tax records and not the general FOIA fee provisions.

Respectfully Submitted,

KREIS, ENDERLE, CALLANDER & HUDGINS, P.C.

Date: 5/27/03

Thomas G. King (P34006)
Stacy Soper-Stine (P60765)

Kreis Enderle Callander & Hudgins

Attorneys at Law
One Moorsbridge
P.O. Box 4010
Kalamazoo, MI
49003-4010